No. 73-370

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

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NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, *Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR RESPONDENT

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## BRIEF FOR RESPONDENT

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### OPINIONS BELOW

The citations to the opinions below are adequately set forth in the Board's brief.

### JURISDICTION

The jurisdictional requisites are adequately set forth in the Board's brief.

### QUESTION PRESENTED

Whether the court of appeals exceeded its authority in reversing as arbitrary, and therefore unwarranted in law, the Board's refusal to order certain remedies in this case.

## STATUTES INVOLVED

Section 10 of the National Labor Relations Act, 61 Stat. 146, 73 Stat. 544, as amended, 29 U.S.C. § 160, provides in part:

> "(f) Any person aggrieved by a final order of the Board * * * denying in whole or in part the relief sought may obtain a review of such order * * * in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * * Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction * * * to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board * * *."

Section 706 of the Adminstrative Procedure Act, 60 Stat. 243, 80 Stat. 393, 5 U.S.C. § 706, provides in part:

> ". . . The reviewing court shall— . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . ."

## STATEMENT

### A. The Board's Initial Decision

In its first decision and order in this case, entered September 24, 1968, the Board found that, in 1967, Heck's, Inc., had violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by threatening to close its Clarksburg, West Virginia, retail store if its employees organized and by coercively interrogating and poll-

ing them about the Union (Op. App. 2a).[1] The Board also found that Heck's refusal to bargain was in bad faith and therefore violated Section 8(a)(5).

The Board explained (Op. App. 3a-5a):

> ". . . Respondent engaged in extensive violations of the Act which directly involved nearly every employee in the unit. We note further that the Board has recently found that this Respondent engaged in a pattern of similar unfair labor practices at its other stores in West Virginia and Kentucky, and that the Respondent has a labor policy in all its stores that is opposed to the policies of the Act. Earlier Board decisions involving the Respondent's operations show that President Haddad and Vice President Darnall, who together control the labor policy at all the Respondent's stores, have both actively participated at a number of stores in conduct found to be unlawful. Both have repeated their unlawful conduct in the present cases. Such flagrant repetition of conduct previously found unlawful shows a complete disregard by the Respondent of its obligations under the Act.
>
> * * *
>
> In the instant cases, the Respondent's refusal to grant recognition, followed by its extensive violations of the Act and its interference with the employees' free choice in the Board-conducted election, clearly evidence its unlawful motive and justify an interference [sic] of bad faith. Consequently, we find, contrary to the Trial Examiner, that the General Counsel has established that the Respondent's refusal to recognize the Union was not based on a good-faith doubt of the Union's majority status. We find further that its refusal

[1] "Op. App." refers to the appendix to the brief in opposition. "Pet. App." refers to the appendix to the petition. "A." refers to the separate appendix to the briefs.

was for the purpose of utilizing the preelection period to undermine the Union majority, and that the Respondent thereby made it impossible to hold a free and fair election. Accordingly, we find that the Respondent refused to bargain with the Union, in violation of Section 8(a)(5) and Section 8(a)(1) of the Act.

In any event the Respondent's extensive Section 8(a)(1) violations, on which it embarked at about the time the Union attained its majority status and which made a free and fair election impossible, justify an order requiring the Respondent to bargain with the Union upon request as an appropriate remedy for the Respondent's 8(a)(1) violations."

The Board ordered remedies traditional in routine Section 8(a)(1) and (5) cases, but denied the Union's request for additional relief.

**B. The Remand**

On May 4, 1970, the court of appeals granted the Board's petition for enforcement of its order (433 F.2d 541), but, on the Union's petition for review, remanded for further consideration of the adequacy of the remedies (433 F.2d at 543). The court explained (*ibid.*):

"Since 1964 Heck's has been the object of nine other unfair labor practice proceedings which show, in the Board's words, 'a labor policy in all its stores that is opposed to the policies of the Act.'" [Footnote omitted].

"The Board's findings of bad faith and flagrant misconduct lead us to remand this case to the Board for reconsideration, in the light of our recent decision in *Tiidee Products* [*International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *NLRB,* 426 F.2d 1243, cert. denied

400 U.S. 950], of the Union's request for further relief.[7] ''

[7] The Union requested a broad range of further relief: . . . [including] Union expenses expended to overcome the effects of the Company's unlawful refusal to bargain.''

In its cited *Tiidee Products* case, the court of appeals, finding that the company's "refusal to bargain was a clear and flagrant violation of the law" (426 F.2d at 1248), had held that in such cases "[e]ffective redress for statutory wrong should both compensate the party wronged and withhold from the wrongdoer the fruits of its violation." It had further held that the Board was empowered to "do something [more than it had traditionally done] to advance the policies of the Act, and prevent the employer from having a free ride during the period of litigation." 426 F.2d at 1251. Among other things the court held the Board could do was assess against re ndent the "costs of litigation." *Ibid.*, note 11. The t, therefore, remanded to the Board for reconsideration the various requests of the union for additional relief, *e.g.*, to compensate the employees for loss of collective-bargaining benefits during the period of the employer's bad faith refusal to bargain,[2] and "such lesser, alternative remedies as an award to the Union for excess organization costs caused by the Company's behavior, or for the costs of having to litigate a frivolous case, or for a combination of these" (426 F.2d at 1253, n.15).

### C. The Board's Supplemental Decision

The Board accepted the remand in this case, and all parties filed briefs with the Board. The Board issued

[2] Hereinafter sometimes referred to as the "make-whole remedy."

its supplemental decision, 191 NLRB 886, on July 1, 1971, before handing down its decision on remand in *Tiidee.*

In preliminary discussion, the Board stated (Pet. App. 29A):

> "Viewed in isolation, the Respondent's conduct as found in this case, although serious, is not so aggravated or pervasive as to warrant additional special remedies. However, as we have had occasion to point out, in a somewhat different context with respect to this Respondent, it is by now clear that Respondent's conduct here is but part of a pattern of unlawful antiunion conduct engaged in by Respondent's top officials throughout Respondent's entire operations for the purpose of denying to all of its employees the exercise of those rights guaranteed the employees by Section 7 of the Act. In such circumstances conduct at a single store such as this can no longer be viewed in isolation; Respondent's conduct must, rather, be viewed in its total context. As so viewed, Respondent's unfair labor practices are clearly aggravated and pervasive. It is, accordingly, against this background of companywide aggravated and pervasive unfair labor practices that we consider the Union's request for additional relief in this particular case." [Footnote omitted.]

The Board concluded that it was appropriate to grant certain additional non-monetary remedies, but refused to approve the Union's requests, *inter alia,* that employees be made whole for loss of collective-bargaining benefits and for a company-wide bargaining order without proof of majority in individual store units. The Board also refused to order reimbursement of excess organizational costs and expenses of litigation engendered by Heck's illegal conduct.

As to the latter, the Board found that the Company's "aggravated and pervasive" unfair labor practices had imposed on the Union excess organizational expenses and costs of litigation.[3] But it refused to order reimbursement for specified reasons (Pet. App. 38A-39A):

> "To determine the appropriateness of these reimbursement requests, we must, we believe, consider the role of a charging party under the statutory scheme in the light of the basic principles, that Board orders must be remedial not punitive,[16] and collateral losses are not considered in framing a reimbursement order.[17] As the Supreme Court has stated,[18] the statutory scheme involves an interblending of public and private interests, and the participation of a charging party in the proceedings, before the Board and in the courts, can serve a public as well as its own private interests. Nonetheless, it is the Board which has been given primary initial responsibility to determine and protect the public interest in the elimination of obstructions to commerce resulting from labor disputes. Such protection of the public interest as may result from the charging party's participation in litigation must be regarded, we believe, as incidental to its efforts to protect its own private interests. Given this statutory framework, we concluded that the public interest in allowing the Charging Party to recover the costs of its partici-

[16] *Republic Steel Corporation* v. *N.L.R.B.*, 311 U.S. 7, 11-12.

[17] *Gullett Gin Company, Inc.* v. *N.L.R.B.*, 340 U.S. 361, 364.

[18] *Intl. Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 283* v. *Scofield*, 382 U.S. 205, 217, *et seq.*

[3] "[W]e are not unmindful of the probability that the Charging Party has spent more money on organizational costs and attorney's fees than it would have spent had the Respondent not refused to bargain." (Pet. App. 38A.)

pation in this litigation does not override the general and well-established principle that litigation expenses are ordinarily not recoverable.[19]

[19] *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714-717. Compare *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, where litigation expenses were awarded under a statute (42 U.S.C. 2000a *et seq.*) which places greater reliance on private action for the vindication of public rights."

On July 9, 1971, the Union again petitioned for review.

**D. The Board's Supplemental Decision in Tiidee**

On January 24, 1972, after the instant case had been fully briefed below, but before oral argument, the Board issued its supplemental decision and order in *Tiidee Products*, 194 NLRB 1234 (A. 28-37). While the Board concluded in that decision that a make-whole order was not appropriate, it granted additional relief, both monetary and nonmonetary, explaining:

> "... the Board believes that the alternative remedies provided hereinafter will undo some of the baneful effects pointed out by the court as having resulted from Respondent's 'clear and flagrant violation of the law.' They will, for one, aid the Union in rebuilding its strength so that it may bargain effectively with Respondent. Also, by requiring Respondent to pay some of the Board and union litigation costs occasioned by its misconduct, similar 'brazen' refusals to bargain will be discouraged." [Footnote omitted]. (A. 33.)

It characterized the proffered rationale for reimbursement of excessive organizing costs and litigation expenses as follows (A. 34):

> "The Union asserts that an award to it of organizational expenses, litigation costs and expenses, and lost initiation fees and dues would meet another of the court of appeals' objections to

the Board's order; *viz.*, that our traditional remedy rewarded Respondent's delaying tactics and increased the likelihood that similar frivolous litigation would clog future Board and court calendars."

It denied reimbursement of organizing expenses because (A.34-35):

> "It is clear that the Union incurred no extraordinary organizational expenses because of Respondent's patently frivolous objection to the election and subsequent refusal to bargain. Despite certain already remedied preelection unlawful Respondent conduct, the Union was selected by the employees after a 2-month campaign at the first election held. *We find, therefore, no nexus* between Respondent's unlawful conduct here under examination and the Union's preelection organizational expenses and, *accordingly, we shall not award them to the Union.*" (Emphasis added.)

With respect to the Union's claim for litigation expenses, the Board stated (A.35-36):

> "We find merit, however, in the Union's request that it be reimbursed for certain litigation costs and expenses. Normally, as the Board recently noted, litigation expenses are not recoverable by the charging party in Board proceedings even though the public interest is served when the charging party protects its private interests before the Board.[16]
>
> We agree with the court, however, that frivolous litigation such as this is clearly unwarranted and should be kept from the nation's already crowded court dockets, as well as our own. While we do not seek to foreclose access to the Board and courts for meritorious cases, we likewise do not want to encourage frivolous proceedings. The policy of the Act to insure industrial peace through collective

[16] *Heck's, Inc., supra,* fn. 20.

> bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available. Accordingly, in order to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest we find that it would be just and proper to order Respondent to reimburse the Board and the Union for their expenses incurred in the investigation, preparation, presentation, and conduct of these cases .... Accordingly, we shall order Respondent to pay to the Board and the Union the above-mentioned litigation costs and expenses.[17]

[17] See also Rule 38, Federal Rules of Appellate Procedure. Cf. *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 166; *Schauffler* v. *United Association of Journeymen*, 246 F.2d 867 (C.A. 3, 1957)."

Thereupon, the Union moved to lodge the Board's *Tiidee* decision with the court below (A. 43-45), arguing, in a supporting memorandum, that the rationale of that decision undermined and invalidated the Board's denial of litigation and organizing expenses in this case. The Board filed no response to that motion, and at no time prior to, or at, oral argument of this case did the Board request that this case be remanded for reconsideration in the light of its supplemental decision in *Tiidee*.

#### E. The Supplemental Decision of the Court of Appeals

The court below issued its supplemental decision herein on March 21, 1973. It agreed that in the supplemental decision in *Tiidee* " . . . the Board itself has subsequently departed from the rationale upon which its refusal of litigation expenses in this case is based" (Pet. App. 9A). It explained (Pet. App. 9A-10A):

> "We think the considerations which motivated the Board to give this enlarged relief in *Tiidee* are also

operative here. Although the Board in its Supplemental Decision in this case has nowhere characterized the litigation as frivolous, it has used the language of 'clearly aggravated and pervasive' misconduct; and in its original opinion it questioned Heck's good faith because of its 'flagrant repetition of conduct previously found unlawful' at other Heck's stores. It would appear that the Board has now recognized that employers who follow a pattern of resisting union organization, and who to that end unduly burden the processes of the Board and the courts, should be obliged, at the very least, to respond in terms of making good the legal expenses to which they have put the charging parties and the Board. We hold that the case before us is an appropriate one for according such relief."

Similarly, as to organizational expenses, the court held (Pet. App. 11A):

"As in the case of litigation expenses, the Board, upon remand in *Tiidee,* has shifted its ground with respect to organizational costs. In its Supplemental Decision in *Tiidee,* the Board did not allow the claim for excess organizational expenses, but it justified that action solely on the ground that '. . . the Union was selected by the employees after a 2-month campaign at the first election held;' and, because of this circumstance, the Board found '. . . no nexus between Respondent's unlawful conduct here under examination and the Union's preelection organizational expenses. . . .' Thus, in *Tiidee* the Board appears to have denied organizational costs because it believed that, on the facts of that case, no unusual organizational costs had been incurred.

"This obviously is quite a different thing from saying that the policies of the Act forbid the allowance of such costs in cases like the one before

us, where the Board has in terms indicated its awareness of 'the probability' that costs were experienced by reason of Heck's intransigence. Under these circumstances we find nothing in the Board's Supplemental Decision which constitutes an adequate justification for the denial of extraordinary organizational costs to which the Union was exposed by reason of Heck's policy of resisting organizational efforts and refusing to bargain; and we think that provision for such costs should have been included in the remedies fashioned by the Board on remand."

## SUMMARY OF ARGUMENT

### I

When an agency remedial order is arbitrary, capricious, or constiutes an abuse of discretion, a reviewing court is obliged to modify it appropriately. The cited standard applies whether the order is challenged as being excessive or inadequate. Insofar as the Board asserts that the court below applied a different standard, the Board is clearly in error.

### II

The court below properly held that the Board's supplemental decision in *Tiidee Products,* 194 NLRB 1234, rationally compelled modification of the remedy in this case.

A. Having held in *Tiidee Products* that the litigation expenses of a charging party should be reimbursed by employers who "frivolously" resist collective bargaining, in order to deter such offenders from cluttering Board and court dockets, the Board could not reasonably refuse a similar remedy to the Union in this case, which had been victimized by an employer found by the Board to have acted in "bad faith" and

to have engaged in "clearly aggravated and pervasive" unfair labor practices (Op. App. 4a; Pet. App. 29A). No legitimate interest, public or private, is served by distinguishing between an employer who proffers a "frivolous" defense and one who advances a "debatable" defense, when the course of conduct of the latter has clearly been actuated by a purpose of obstructing the policies and processes of the Act.

B. By abandoning, in *Tiidee Products,* the reasons professed in this case for not awarding excess organizational expenses suffered by a union at the hands of a lawless employer, and by clearly indicating in *Tiidee* that such an award is appropriate when a nexus between the extraordinary expenses and the unlawful conduct is demonstrated, the court below acted properly in awarding such relief here, where the Board had expressly noted the "probability that the Charging Party has spent more money on organizational costs and attorney's fees than it would have spent had the Respondent not refused to bargain" (Pet. App. 38A).

C. No remand was necessary. The court did not find that the Board had changed its policy, but rather that the rationale underlying the *Tiidee* gloss on this case necessarily comprehended the facts of this case. The court below had the power to decide this question of law, and it properly recognized that any attempt by the Board on remand to maintain its position that the cases were distinguishable would be an arbitrary and capricious result.

## III

Even absent the Board's decision in *Tiidee Products,* the Board erred as a matter of law in refusing

to order reimbursement of the Union's litigation costs and excess organizing expenses in this case.

A. The Act obliges, not merely authorizes, the Board to grant appropriate remedial relief. In this case, the Board correctly acknowledged that, in the matter of awarding counsel fees, it should be guided by precedents forged by the courts, which have considered the question thoroughly over the years. The Board misunderstood the nature of the traditional American rule, however, and failed to give cognizance to the established exception of awarding counsel fees to a successful party whose opponent has acted in bad faith.

Despite its misapprehension of the traditional rule, the Board acknowledged that the public service rendered by a charging party is meaningful and might serve as a basis for awarding counsel fees, but finally concluded that the participation of the charging party is not sufficiently substantial, within the statutory framework, to override the misconceived "general and well-established principle that litigation expenses are ordinarily not recoverable" (Pet. App. 39A). In so demeaning the status of the charging party, the Board (1) rejected the teaching of this Court in *Auto Workers* v. *Scofield,* 382 U.S. 205, as to the role of the charging party in the statutory scheme; (2) failed to recognize that the charging party's participation promotes the public interest even if, *arguendo,* it is seeking to advance its own private interests; (3) ignored relevant case law supporting the encouragement of the participation by private parties in vindicating statutory policy; and (4) disregarded the factual and legal importance of the charging party to the processes of the NLRA.

B. In refusing to order reimbursement of the Union's extraordinary *organizational* expenses, engendered by the employer's flagrant misconduct, on the totally irrelevant ground of the asserted relative insignificance of participation by a charging party in *litigation*, the Board acted irrationally. Since the requested remedy is manifestly appropriate, and the Board's denial thereof was completely without rational basis, the Board erred as a matter of law in refusing to grant the remedy.

## ARGUMENT

### I. THE COURT BELOW APPLIED THE PROPER STANDARD IN REVIEWING THE BOARD'S ORDER

The first question said by the Board to be "presented" here is:

> "Whether a remedial order of the National Labor Relations Board which is challenged by the charging party as inadequate to effectuate the purposes of the Act is entitled to the same respect by a reviewing court as an order challenged as going further than necessary to effectuate those purposes."

The Board argues that the same standard of judicial review should apply in both situations; the Union, as discussed below in Point II, agrees. But the question "presented" and the Board's brief suggest that the court below believed that a different standard was applicable to challenges based on inadequacy of the remedy; in this, the Board is clearly in error.

Nothing in the opinion below even remotely suggests that the court applied or purported to apply a different standard of appellate review to Board remedies claimed to be inadequate than to remedies at-

tacked as excessive. To the contrary, in upholding the Board's denial of other additional remedies, the court made clear its awareness and application of the appropriate standard of review.[4] The most searching scrutiny of the court's opinion can unearth no shred of evidence that, in its treatment of litigation and organization expenses, the court applied a different standard of review than the one the court properly applied in reviewing other aspects of the remedy ordered by the Board.

Accordingly, to the extent that the Board's argument for reversal is predicated on a claim that the court below invoked a *different* and improper standard of review in treating with litigation and organization expenses, it must be rejected.

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[4] The Board's refusal to grant the Union access to employees on company property was sustained by the court below as "an exercise of judgment which we are not disposed to overturn" (Pet. App. 6A). The Board's denial of the Union's request for a company-wide bargaining order was sustained as based on "considerations [which] seem to us rational in nature and well within the range of respect traditionally to be accorded by us to the Board's determinations [citing *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612, n. 32 (1969); *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964); *International Union of Electrical Workers* v. *NLRB* (*Tiidee Products*), 426 F.2d 1243, 1250 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 950]" (Pet. App. 7A-8A). (The first two of the cited cases involved claims by a respondent that the Board's remedy was too broad. In the third case, which involved a claim by the charging party that the remedy was too narrow, the Board accepted the remand. The joint citation of these three precedents proves that the Court of Appeals was not applying a double standard.) Furthermore, in upholding the Board's determination in this case that a make-whole remedy was not warranted, the court said: "[W]e are not inclined to say that the Board's treatment of this issue on remand is beyond the wide range of latitude traditionally accorded the Board in the matter of remedies" (Pet. App. 16A-17A).

## II. THE COURT BELOW ACTED WELL WITHIN ITS ALLOTTED REVIEWING AUTHORITY IN ENLARGING THE REMEDIES ORDERED BY THE BOARD

### A. The Court Correctly Concluded That the Board Acted Arbitrarily in Refusing To Award Litigation Expenses

In enlarging the Board's remedy here, the court below obeyed the mandate of Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, that reviewing courts shall:

> ". . . hold unlawful and set aside agency actions, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . ."[5]

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[5] This Court has enunciated in several ways the proper standard of judicial review of agency remedies, all of which, while arguably subject to varying interpretations, appear to reflect the governing standard prescribed by Section 706 of APA. See, *e.g.*, *American Power Co.* v. *S.E.C.*, 329 U.S. 90 (" . . . only if the remedy chosen is unwarranted in law or is without justification in fact should a court attempt to intervene . . . ," at pp. 112-113; " . . . so lacking in reasonableness as to constitute an abuse of [the agency's] discretion," at p. 115); *F.T.C.* v. *Universal-Rundle Corp.*, 387 U.S. 244 ("patently arbitrary and capricious," at p. 250; "a patent abuse of discretion," *ibid*); *Jacob Siegel Co.* v. *F.T.C.*, 327 U.S. 608, 612 (whether the agency "abused its discretion"); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612, n. 32 ("[the Board's] choice of remedy must therefore be given special respect by reviewing courts").

It should be noted that the Board cites (Br. 13, 14) certain formulations of the scope of review appearing in cases where the remedy was claimed to be excessive which obviously cannot be applied to cases, like this one, in which the remedy is challenged as inadequate to effectuate the policies of the Act. *E.g.*, " . . . unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act" (*Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540); " . . . no reasonable relation to the unlawful practices found to exist" (*Jacob Siegel Co., supra*, at 613).

Comprehensive definition of the terms "arbitrary" "capricious," and "abuse of discretion" is no simple task.[6] One manifest category of agency arbitrariness, however, and the one which prompted the court below to rule as it did, is invidious inconsistency.

When an agency treats disparately two situations which are fundamentally alike, with no rational basis drawn for the distinction, it oversteps one of the outer boundaries of agency authority—the prohibition against "arbitrary" action. This elementary principle was invoked by this Court in *NLRB* v. *United Mine Workers,* 355 U.S. 453, 460, 463, where the Court rejected a cease-and-desist order which, the Court recognized, "misapplies the Board's own policy" and thus "constitutes an abuse of the Board's discretioary power". See also, *NLRB* v. *Mall Tool Co.,* 119 F.2d 700, 702 (7 Cir.) (rejecting the Board's departure from a settled back pay practice: "Consistency in administrative remedies is essential, for to adopt different standards for similar situations is to act arbi-

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[6] The courts have treated the terms interchangeably. *Hartford-Empire Co.* v. *Obear-Nester Glass Co.,* 95 F.2d 414, 417 (8 Cir.) ("abuse of discretion" is "arbitrary action not justifiable"); *Gonzalez* v. *Freeman,* 334 F.2d 570, 580 (D.C. Cir.) ("[B]ecause arbitrary and capricious . . . , hence an abuse of discretion").

In construing all these terms as they appear in the Administrative Procedure Act, this Court, in *Citizens To Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 416, adopted the definition of "abuse of discretion" proffered by Judge Magruder in *In Re Josephson,* 218 F.2d 174, 182 (1 Cir.), the Court restating the test as "whether the decision was based on a consideration of the relevant factors and whether there has been a *clear error of judgment.*" (Emphasis added.) Professor Berger suggests simply that "arbitrariness consists of action that is unreasonable under all the circumstances." Berger, *Administrative Arbitrariness and Judicial Review,* 65 Col. L. Rev. 55, 82 (1965).

trarily."); *Burinskas* v. *NLRB,* 357 F.2d 822, 827 (D.C. Cir.) (". . . the Board cannot act arbitrarily nor can it treat similar situations in dissimilar ways"); *Cooper Thermometer Company* v. *NLRB,* 376 F.2d 684, 691 (2 Cir.); *J. P. Stevens & Co.* v. *NLRB,* 406 F.2d 1017, 1024 (4 Cir.); Wright, *Beyond Discretionary Justice,* 81 Yale L. J. 575, 594 (1972) ("One of [the courts'] underlying functions is to ensure that official action is not irrational or invidious."). The Board's lengthy argument (Br. 17-23) that the court below erred in concluding that *Tiidee* undercut the Board's rationale in this case is implicit recognition that the Board's order could not stand if, in fact, it had been undermined by *Tiidee.*[7]

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[7] Certain characteristics peculiar to administrative agencies must, of course, necessarily influence a reviewing court's judgment of whether an agency has acted arbitrarily. Thus, while an agency is barred from inconsistency, it may lawfully indulge in inconstancy. *FCC* v. *WOKO,* 329 U.S. 223, 228; *Motor Freight Express* v. *United States,* 119 F. Supp. 298, 305 (M.D. Pa.), affirmed *per curiam* 348 U.S. 891 (" . . . an agency may change its mind."). Here, however, the Board did not simply change its mind, see n. 12, *infra.*

In addition, the superior expertise brought to bear by an agency has often been stressed by this Court in emphasizing the need to give an agency leeway in constructing a comprehensive remedial system which takes into account the often esoteric and arcane considerations implicated in the statute administered by the agency. See, for example, *Moog Industries, Inc.* v. *FTC,* 355 U.S. 411, 413. Where, however, as in this case, the agency's invidious determination can in no wise be defended as either a "change of mind" by the agency or an exercise of "specialized, experienced judgment" (*Moog Industries, Inc., supra*) based on "accumulated experience and knowledge which no court can hope to attain," *American Power Co.* v. *S.E.C., supra,* 329 U.S. at 112, then the "special respect" due its choice of remedies is necessarily diminished. See, *S.E.C.* v. *Cogan,* 201 F.2d 78, 83-87 (9 Cir.); *NLRB* v. *Guy F. Atkinson Co.,* 195 F.2d 141, 150-151 (9 Cir.); L. Jaffe, *Judicial Control of Administrative Action,* 577, 579 (1965).

In light of *Tiidee,* the court below elected to decide simply whether the Board had acted arbitrarily in refusing to apply in this case the rationale it enunciated for granting the remedy in *Tiidee*—a rationale grounded not on administrative expertise but solely on the public interest in deterring wrongdoing employers from clogging Board and court dockets. That question was of "such a nature as to be peculiarly appropriate for independent judicial ascertainment as [a] 'question of law'," *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U.S. 504, 508, and the determination of the court below that the Board had not adequately justified its inconsistent treatment of this case and *Tiidee* was the very stuff of *judicial* expertise, and indeed a classic example of the appropriate role of the judiciary in reviewing administrative action. See *SEC* v. *Cogan, supra; NLRB* v. *Guy F. Atkinson Co., supra.*

The court of appeals merely placed the Board's supplemental decisions in *Tiidee* and in this case side by side, and concluded that the latter could not rationally stand beside the former.[8] In its original decision in the instant case, the Board drew an inference of "bad faith" and found that Heck's "refusal to recognize the Union was not based on a good-faith doubt of the Union's majority status" (Op. App. 4a, 5a). Despite this express finding, the Board announced, in its supplemental decision (Pet. App. 38A-39A), as a general

[8] The Board accuses the court below of having misread *Tiidee* in concluding that aggravated misconduct, as well as a frivolous defense, warrants the remedy (Br. 21-23). But, of course, the court fully appreciated what the Board had said in *Tiidee;* its holding here was simply that the Board could not reasonably differentiate between "frivolous defenders" and "willful violators," inasmuch as both "unduly burden the processes of the Board and the courts" (Pet. App. 10A).

rule, that it would not award litigation expenses to a charging party, because of (1) the asserted subordinate role of the charging party in the statutory scheme; (2) the Board's policy of disregarding "collateral losses"; (3) the Board's lack of power to grant "punitive" relief; and (4) the supposed general American rule which denies counsel fees to the successful party in litigation. In the subsequent *Tiidee* supplemental decision awarding counsel fees for what it termed "frivolous litigation," the Board obviously retreated from all of these reasons. The express and only rationale for this exception was to free "crowded court dockets, as well as [the Board's] own" from the burdens imposed by employers seeking to delay compliance with their statutory obligations.

Board counsel now argue that the results in the two cases are reconcilable—that the Board drew a permissible distinction between "frivolous litigation," such as the Board found *Tiidee* to be, and litigation in which the respondent presents "debatable" issues, which the Board's brief now asserts is a proper characterization of the *Heck's* litigation. Assuming the validity of this analysis of the two cases, it must be emphasized that, as pointed out above, the Board's first decision in this case found that Heck's refusal to recognize the Union had been in "bad faith."[9] As the court below recognized, rationality precludes any viable distinction between the remedies to be afforded those who must suffer the expense of prosecuting violations defended on "frivolous" grounds and those who are compelled to incur such expenses by "bad faith" refusals to bargain

[9] In an effort to gloss over the Board's original finding, the Board's brief (p. 21, n. 14) looks for solace to the Trial Examiner's finding of good faith, which the Board subsequently reversed.

The avowed objective of *Tiidee's* award of litigation expenses in "frivolous proceedings" is to further "speedy access to uncrowded Board and Court dockets" (A. 35, 36). However, when an employer in "bad faith" refuses to extend recognition to a union, thereby compelling the Union and the Board to resort to litigation to achieve what the Union should have had earlier and without litigation, he necessarily falls within the class of violators who unjustifiably clog "access to . . . Board and court dockets." If an employer engages in illegal conduct for the purpose of delaying compliance with his statutory duty, the resultant litigation unnecessarily burdens Board and court dockets, regardless whether the employer is able to present in the litigation a defense which may be characterized as "debatable." [10]

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[10] The allegedly "debatable" defense here appears to be some minimal and completely suspect testimony, discredited by the Trial Examiner, from two employees, purportedly casting doubt on the validity of four authorization cards obtained by the Union prior to its first request for recognition on May 20, 1967 (A. 13-16); a poll of employees (found to be "palpably illegal"), in which employees were approached by Heck's vice president and asked to sign a slip of paper indicating their desires as to union representation (A. 6-7, 12); and Heck's success in three instances in the past in challenging union claims of majority representation (A. 17). The Trial Examiner's decision shows, however, that while the illegal poll had inconclusively indicated 11 employees in favor of the Union, 13 against, 6 registering "no comment" and 3 not polled (A. 7, n. 4), the company's blatantly false response to the Union's first demand for recognition was that "a majority of the employees have advised the Company that they did not desire your union to represent them" (A. 16). It is clear from this immediate manifestation of bad faith that the Company was ready and willing to prevaricate in order to gain time in which to forestall recognition at all costs, up to and including litigation of the Union's right to be recognized. The fact that the company adventitiously succeeded in dredging up testimony which could theoretically serve as

In attempting to discourage impediments to "speedy access to uncrowded Board and court dockets" (A. 35-36), the Board could not rationally draw a distinction between an employer who asserts a frivolous reason for refusing to bargain and an employer, like Heck's which has been found in the past to have a "labor policy in all its stores that is opposed to the policies of the Act," which has engaged in "flagrant repetition of conduct [showing] a complete disregard . . . of its obligations under the Act" (Op. App. 3a, 4a), and which in the present case has been found guilty of "clearly aggravated and pervasive" misconduct (Pet. App. 29A) obviously calculated to obstruct bargaining and, thereby, foreseeably and inevitably, compelling litigation which unjustifiably clutters Board and court calendars.

In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, this Court held that the Board may properly enter a bargaining order on the basis of authorization cards signed by employees, despite the fact that the union has not prevailed in an election, where the Board concludes that the employer's coercive anti-union conduct has made it unlikely that an election would fairly reflect employee sentiment. An employer who engages in such wrongful conduct in an effort to stave off unionization thus, under the *Gissel* test, fairly invites litigation to determine the propriety of issuance of a bargaining order. In light of the *Gissel* rule, accordingly, a court would be impelled to conclude, as the court

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a basis for defending against the General Counsel's complaint cannot justify the employer's determined non-compliance with its known obligations under the Act or relieve it of the need to remedy the effects of the consequent compulsion upon the Union to resort to the Board for relief.

below did, that an employer who deliberately engages in willful coercion and restraint of employees, thereby provoking litigation to determine whether his wrongful conduct likely had the prohibited effect, is conceptually indistinguishable from an employer who interposes a frivolous objection to a bargaining demand which similarly provokes litigation. Cf. *NLRB* v. *Trama,* 293 F.2d 28 (9 Cir.).[11]

The Board says that in distinguishing between "frivolous" and "non-frivolous" respondents, it is reasonably balancing "conflicting *legitimate* interests" (Br. 19; emphasis added). That argument might be persuasive if the "non-frivolous" respondent was not also a recidivist. But where the Board is confronted with a willful, bad-faith, offender like Heck's, there is no *"legitimate* private interest" (Br. 18; emphasis added), and no legitimate public interest, in allowing the respondent "to obtain an adjudication of the issues

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[11] In marked contrast to this case, the decision of the Court of Appeals for the Eighth Circuit reversed by this Court in *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, clearly exceeded the recognized bounds of judicial review. The lower court there had found "unconscionable" a suspension of a registrant imposed by the Secretary of Agriculture. The Secretary had concluded that suspension was appropriate "in light of respondent's disregard of [three] previous warnings" (411 U.S. at 181). Whether or not the Secretary had a prior practice of imposing suspensions only for "intentional and flagrant conduct" (see 411 U.S. at 187), in *Glover* the Secretary had examined the history of the registrant's conduct to determine the appropriate penalty for a fourth violation, thus taking into account the special circumstances relevant to the proper sanction for the particular offender before him, and it was beyond the province of the court of appeals to judge that some lesser sanction would be "appropriate and reasonable." In this case, on the contrary, as the court below noted, the abstract considerations which motivated granting the relief in *Tiidee* "are also operative here" (Pet. App. 9a-10a).

he presents" (Br. 19) without at least risking payment of his victim's counsel fees if his conduct is ultimately found to be a flagrant, willful, bad faith violation. For award of counsel fees must be considered in the perspective of the Board's charter, which commands that it devise "remedies to effectuate the policies of the Act." *Labor Board* v. *Seven Up Bottling Co.*, 344 U.S. 344, 346. The Board must, therefore, assure that its remedies do not "operate[ ] in a real sense so as to be counter-productive, and actually reward an employer's refusal to bargain during the critical period following a union's organization of his plant." *Tiidee* case, *supra*, 426 F.2d at 1249. To this end, in cases of "brazen refusal to bargain" (*id.*) the Board must "at least do something to advance the policies of the Act and prevent the employer from having a free ride during the period of litigation." (*Id.* at 1251). In the context of this statutory mandate, it is arbitrary for the Board to separate "considerations of [Board and] judicial administration" from "furtherance of national labor policy" (*id.* at 1249), and pursue only the former. When both private and public interests in discouraging willful, brazen refusals to bargain "collide[]" with the asserted "right" of a bad faith violator to litigate his defenses without risking assessment of counsel fees, the latter must give way. See pp. 32-36, *infra*.

**B. The Court Properly Held That the Board Acted Arbitrarily in Failing To Award Excess Organizational Expenses**

The court below also correctly concluded that, under the *Tiidee* rationale, organizational costs must be awarded here.

In its supplemental decision in the instant case, the Board determined that such costs were not compen-

sable for three of the same reasons it gave for denying counsel fees, *i.e.,* (1) the statutory role played by the charging party; (2) the principle that "Board orders must be remedial not punitive"; and (3) the principle that collateral losses are not considered in framing a reimbursement order" (Pet. App. 38A, 39A). However, in *Tiidee,* these generalizations disappeared; the only reason advanced by the Board for denying such expenses was that it found "no nexus between Respondent's unlawful conduct . . . and the Union's preelection organizational expenses." Tellingly, it concluded: "[*A*]*ccordingly,* we shall not award [such expenses] to the Union" (A. 35; emphasis added).

In contrast to its cautious caveat in *Tiidee* expressly disagreeing with the court's opinion that the Board is empowered to enter a make-whole remedy, the Board uttered not a whisper of dissent from the court's suggestion on remand that the Board is authorized to award excess organizational costs. Instead, because it found no relationship between the unlawful conduct and the preleection organizing outlays, the Board simply decided that "we shall not award" expenses to the union. But in *this* case, the Board expressly recognized the "probability that the Charging Party has spent more money on organizational costs . . . than it would have spent had [Heck's] not refused to bargain (Pet. App. 38A).

Since the three factors upon which the Board relied here for denial of relief were plainly discarded in *Tiidee;* since the right to recoupment of such expenses was clearly recognized in *Tiidee;* and since the Board itself found probable nexus here between Heck's violations and the Union's excess organizing expenses, the court was led irresistibly to its conclusion that nothing

in the Board's supplemental decision "constitutes an adequate justification" for denial of the claim for extraordinary organizational costs.

In sum, the court of appeals, far from substituting its judgment for the Board's, as the Board now contends, merely held that the Board's own standards compelled the grant of the requested remedy, and that any other result was necessarily "unwarranted in law." *American Power Co.* v. *S.E.C.*, 329 U.S. 90, 112.

**C. No Remand Was Required**

The Board contends that if the court below believed that *Tiidee* and the instant decision were inconsistent, "it should have remanded the case to the Board to consider whether and in what manner the change should affect the remedy in this case" (Br. 28). But the relevant history shows that remanding the case would have been pointless and unwarranted.

In the supplemental decision in *Tiidee*, in which the Board articulated its rationale for granting legal expenses and withholding organizing expenses, it expressly cited its supplemental decision here, thus clearly indicating its conclusion that those legal considerations which moved it to action in *Tiidee* did not, in the Board's opinion, require the same result in this case. Further, when the Union lodged the *Tiidee* decision with the court prior to argument in this case (A. 43), with a supporting memorandum asserting that the intervening *Tiidee* rationale required reversal in this case, the Board made no written response, and its counsel in oral argument did not suggest or request a remand for reconsideration. In these circumstances, the Board may not be permitted to occasion further delay, particularly where any decision it might reach

contrary to that of the court below could not legally survive still another court review. "The Board has had its chance . . . . This case has now reached a posture where there is only one rational course for the Board to follow." *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* v. *NLRB*, 459 F.2d 1329, 1347 (D.C. Cir.).[12]

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[12] The Board (Br. 28) cites *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20, for the proposition that " . . . when an error of law is laid bare . . .the matter once more goes to the [agency] for reconsideration." That course of action is appropriate in cases such as *Idaho Power*, where the reviewing court had found the agency to lack authority to attach particular conditions to a license; as this Court noted, options were still open to the agency: "On remand the Commission might have reissued the order without the contested conditions or it might have withheld its consent to any license" (344 U.S. at 20). Here, however, there was only one corrective for the Board's invidious discrimination in favor of Heck's—to grant the *Tiidee* remedy. Where the error of law leaves no room for further exercise of administrative discretion, remand is unnecessary. See *Labor Board* v. *Express Publishing Co.*, 312 U.S. 426; *Labor Board* v. *Jones & Laughlin Steel Co.*, 331 U.S. 416.

The Board's further contention that the court below regarded *Tiidee* as a "change of policy," requiring remand of this case for consideration of whether the "change of policy" should be applied retroactively (Br. 27-28), misapprehends the court's decision. The court fully recognized that (as the Board now argues) *Tiidee* announced a previously undeclared exception to the rule enunciated in this case, not a complete abandonment of that rule. The court merely held that the rationale underlying that exception must necessarily encompass the facts of *this* case, a contention the Board had already rejected by distinguishing the instant case in its supplemental decision in *Tiidee*. Since this case was the first to present the question whether the "frivolous defense" exception necessarily encompasses bad faith violations, retroactivity considerations are not a bar. "Every case of first impression has a retroactive effect • • • ." *Security & Exchange Commission* v. *Chenery*, 332 U.S. 194, 203. The Board had already demonstrated, by its award of counsel fees in *Tiidee*, that it considered this kind of retroactivity no obstacle.

## III. EVEN ABSENT TIIDEE, THE BOARD ABUSED ITS DISCRETION IN NOT AWARDING LITIGATION AND ORGANIZATIONAL EXPENSES IN THIS CASE

### A. The Board Abused Its Discretion in Disallowing Legal Fees Here

Respondent submits that, pretermitting the conclusive effect of the intervening decision in *Tiidee* on this case, the Board's refusal to compensate the Charging Party for litigation expenses engendered by Heck's flagrant misconduct constituted an abuse of administrative discretion, subject to judicial modification.

Section 10(c) of the Act (61 Stat. 147, 29 U.S.C. § 160(c)) enjoins the Board, upon finding that an unfair labor practice has been committed, "to take such affirmative action . . . as will effectuate the policies" of the Act. This Court has characterized that injunction as a "broad command," *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262, which, as the Court of Appeals for the District of Columbia Circuit has said, "is not a mere charter of authority that the Board has the option to exercise or ignore." *International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *NLRB (Tiidee Products, Inc.)*, 426 F. 2d 1243, 1249.

"[T]he business of the Board, among other things, is to adjudicate and remedy unfair labor practices," *NLRB* v. *Strong*, 393 U.S. 357, 360; "Section 10(c) . . . charges the Board with the task of devising remedies to effectuate the policies of the Act," *Labor Board* v. *Seven-Up Co.*, 344 U.S. 344, 346. And, in devising such remedies, the Board must concern itself with "the undoing of the effects" of unfair labor practices, *Virginia Electric & Power Co.* v. *Labor Board*, 319 U.S.

533, 540, the "restoration of the situation, as nearly as possible, to that which would have obtained but for the" wrongful conduct, *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, 194. It cannot be gainsaid that a refusal by the Board to order a plainly appropriate remedy, where it justifies such inaction upon patently indefensible grounds, is an abuse of discretion which a reviewing court is not merely empowered but obliged to correct.

The *power* of the Board to award compensation for litigation expenses in appropriate cases is not disputed and the Board expressly recognized the existence of that power in its supplemental *Tiidee* decision. The question presented, therefore, is whether the Board acted arbitrarily and in defiance of the Section 10(c) mandate in refusing such an order against Heck's, as intransigent and unconscionable an offender as the Board has ever had before it.

In its supplemental decision here, the Board initially named three considerations it thought relevant to the requested relief: "the role of a charging party under the statutory scheme in the light of the basic principles that Board orders must be remedial not punitive, and collateral losses are not considered in framing a reimbursement order," but it finally rested upon the "statutory framework" in concluding that "the public interest in allowing the Charging Party to recover the costs of its participation in this litigation does not override the general and well-established principle that litigation expenses are ordinarily not recoverable" (Pet. App. 38A, 39A). It is clear that, as *Tiidee* demonstrates, the Board thought its "punitive" and "collateral loss" concerns to be as inconsequential

as they are,[13] and that the Board's primary reasons for refusing to reimburse these direct losses were the asserted nature of the traditional American rule governing recovery of such losses and the asserted role of the charging party in the statutory scheme. On both counts, the Board misconceived the applicable law.

Essentially, the Board reasoned as follows:

1. The general American rule is that litigation expenses are not recoverable.

2. While there is a measure of "public interest" in allowing a charging party to recover such expenses, it is not on balance sufficient, in view of the "statutory framework," to override the asserted general principle.

Thus, although the Board perceived a sound basis for awarding counsel fees to charging parties, it believed that basis insufficient to permit departure from what it conceived to be a judicially-established rule against such recoveries. As we shall establish *infra,* the Board misconceived the scope of that rule, and thereby erred as a matter of law. The Board argues here, however, that even if the federal courts have traditionally awarded fees in cases analogous to this one (which the Board denies), it does not follow that the Board must do likewise (Br. 24). But by relying on the "general and well-established rule," the Board

[13] In awarding such costs in *Tiidee,* the Board properly recognized that the expenses are not collateral, but rather direct losses attributable to the employer's misconduct, and that the remedy is not "punitive" in the sense contemplated by *Republic Steel Corporation* v. *NLRB,* 311 U.S. 7, 11-12, but rather constitutes compensation for losses, precisely measured by the expenses incurred by the union which the employees have chosen as their representative, resulting from the employer's violations of the Act. See *Labor Board* v. *Seven-Up Co.,* 344 U.S. 344, 348.

itself was sensibly recognizing that, in this area, which is alien to Board expertise, the distillate of years of judicial experience in determining when the award of legal fees is remedially appropriate would perforce be applicable to Board remedies, unless some good reason appeared for *not* applying the normal rule.[14] The Board's instinct was correct; it simply misconceived what the judicial rule is.

We are nonplused by the Board's contention that the "bad faith" exception, as explicated in the cases cited in our brief in opposition, applies *only* where the "losing party has . . . acted in bad faith *in the litigation itself*" (Br. 24, n. 17, emphasis added). The historic "bad faith" exception clearly applies to the illegal conduct which *provoked* the litigation, regardless whether the losing party also acted in "bad faith in the litigation itself."

Thus, in the leading case, *Vaughan* v. *Atkinson,* 369 U.S. 527, this Court noted that counsel fees were allowed in *The Apollon,* 9 Wheat. 362, ". . . an admiralty suit where one party was put to expense in recovering demurrage of a vessel *wrongfully seized*" (369 U.S. at 530; emphasis added). And the dispositive passage on this point in *Vaughan,* only partially quoted by the Board (Br. 24-25, n. 17), demonstrates that it was the

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[14] The Board's citation (Br. 24) of *Securities & Exchange Commission* v. *Chenery Corp.,* 318 U.S. 80, for the proposition that the Board is "not bound by settled judicial precedents" not only overlooks the fact that the Board here explicitly *did* rely on judicial precedents, but also that *Chenery* sustained the power of agencies to go *beyond* judicial precedents to effectuate statutory policy. It does not stand for the proposition that an agency can claim to be performing its statutory duty where it stops short of granting well-established compensatory remedies.

nature of the default, not the absence of an arguable litigation defense, for which compensation was ordered:

> "In the instant case respondents were *callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance,* libellant was forced to hire a lawyer to get what was *plainly owed him* under laws that are centuries old. The *default* was willful and persistent." (*Id.* at 530-531; emphasis added.)

In *Local No. 149, United Auto Workers* v. *American Brake Shoe Co.,* 298 F.2d 212, 216 (4 Cir.), the court, addressing the facts of the case, held that "[i]n an appropriate case attorneys' fees should be awarded against a party who, without justification, refuses to abide by the award of an arbitrator." It did *not* say, as the Board now states (Br. 24, n. 17), that such fees will be awarded "only" in such circumstances. Further, it very plainly did not imply any such limitation, for, earlier in its opinion (at p. 215), the court had described the general rule to be that such costs may be recovered "in the case of fraud, oppression, or bad faith cases of fiduciary relationship" (quoting from *Specialty Equipment & Machinery Corp.* v. *Zell Motor Co.,* 193 F.2d 515, 520-521 (4 Cir.)) and where the *"wrongdoers' action* is unconscionable, fraudulent, willful, in bad faith, vexatious or exceptional" (citing 11 cases; emphasis added).

The Board's attempt to distinguish the other cases cited in our brief in opposition is equally untenable. In *Brewer* v. *School Board of the City of Norfolk, Virginia,* 456 F.2d 943, 949 (4 Cir.), the court expressly noted that the bad-faith exception is two-pronged:

> "The other normal exception to the general rule is illustrated by those 'exceptional cases' 'where

> *the behavior* of a litigant has reflected a willful and persistent "defiance of the law" ' [citation omitted] or where 'an unfounded action is brought or maintained in bad faith, vexatiously, wantonly, or for oppressive reasons.' " (Emphasis added.)

So too, in *Siegel* v. *William E. Bookhultz & Sons, Inc.*, 419 F.2d 720, 723 (D.C. Cir.):

> "Courts in some number have held that a party may recover the fees of his counsel where *the conduct* of his opponent has been oppressive [citations omitted]." (Emphasis added.)

In *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, upon which the Board relied for the "general rule" (Pet. App. 39A), this Court made it clear that recovery of fees incurred as a result of "deliberate or willful infringement" of a trademark would have been consistent with the established "bad faith" exception (as at least five courts of appeals had previously held, *Fleischmann*, 386 U.S. at 715-716, n. 4), were it not for the intricate remedial system established in the Lanham Act which, the Court inferred, indicated a Congressional intent not to allow attorneys' fees as a remedy for the statutory cause of action.

More recently, in *Hall* v. *Cole*, 412 U.S. 1, 5, the Court stated the rule as follows:

> "Thus, it is unquestioned that a federal court may award counsel fees to a successful party *when his opponent has acted* 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' " (Emphasis added.)[15]

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[15] The citation for the quoted phrase is 6 Moore's *Federal Practice* ¶ 54.77[2], p. 1709 (2d ed. 1972). It is of interest to note that the Board cites this source in its brief (p. 19, n. 12), setting out as

The Court cited for this proposition, *inter alia, Bell* v. *School Board of Powhattan County,* 321 F.2d 494, 500 (4 Cir.) (where counsel fees were awarded because of "... the long continued pattern of evasion and obstruction which included not only the defendants' unyielding refusal to take any initiative, thus casting a heavy burden on the children and their parents, [but also] their interposing a variety of administrative obstacles to thwart the valid wishes of the plaintiffs for a desegregated education."), and *Rolax* v. *Atlantic Coast Line R. Co.,* 186 F.2d 473, 481 (4 Cir.) ("The justification [for an award of counsel fees] here is that plaintiffs of small means have been subjected to discriminatory and oppressive conduct by a powerful labor organization ...").

In short, the analysis contained in footnote 17 of the Board's brief not only misstates the thrust of the cases there discussed, but improperly truncates the broad reach of the "bad-faith" exception.

Since Heck's is, in the *Vaughan* sense, a "willful and persistent" violator, and since the charging party's litigation expenditures in such cases are the *direct* result of the wrongdoer's unconscionable conduct (*Vaughan* case, *supra*), there can be no doubt whatever of the Board's duty under Section 10(c) of the Act to grant this remedy at least here and in all cases

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well the modifying phrase with which Professor Moore prefaced the quoted language: "where an unfounded action or defense is brought or maintained in bad faith, etc." It is apparent that the Court's substitution in *Hall* of the operative factor—"when his opponent has acted" in lieu of "when an unfounded action or defense is brought or maintained"—was intended to express disapproval of Professor Moore's unwarranted limitation on prevailing precedent.

governed by the exception to "the general and well established principle" described above.[16]

The Board having misunderstood the "general and well established principle," and having overlooked the exception which governs this case, there remains only the Board's excuse that private parties and their counsel should be denied compensation for their efforts because Congress vested in the Board and its counsel the "primary initial responsibility to determine and protect the public interest" in eliminating unfair labor practices. It should be observed at the outset that any persuasive force this argument may have had before *Tiidee* has been sapped by the Board's award of litigation fees to a charging party in that case. But prescinding the virtual abandonment of this contention in *Tiidee,* it is apparent that, while purporting to pay lip-service to *Auto Workers* v. *Scofield,* 382 U.S. 205, the Board, in actuality, flouts it. *Scofield* "interred in the cause of wisdom"[17] the outworn "public interest" dogma, on which the Board had so long and successfully relied to justify stifling, curtailing, and derogating the role of charging parties and their private counsel in unfair labor practice cases. This Court not only explicitly repudiated the "public" versus "private" interest dichotomy (*Scofield,* 382 U.S. at 218; *id.* at 220-222), holding that "the two interblend in the intricate statutory scheme," but explicitly held that, at least since 1947, the Board's self-image as a unique

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[16] Since, as discussed, the exception applies to wrongdoers who have *acted* in bad faith, as well as to those who have *litigated* in bad faith, the Board's purported distinction between "frivolous" and "debatable" litigation is, under the established American rule governing award of counsel fees, irrelevant.

[17] *Amalgamated Meat Cutters and Butcher Workmen, AFL-CIO* v. *Connally, et al.,* 337 F. Supp. 737, 745 (D.C. D.C. 1971).

Sir Lancelot, single-handedly battling to effectuate the public interest in eradicating unfair labor practices, is quite false: "[S]ince 1947, [the Board] serves substantially as an organ for adjudicating private disputes" (382 U.S. at 221, note 18, penultimate sentence). Indeed, the Court held that "the Labor Act recognizes the existence of private rights within the statutory scheme" and "the rhetoric of 'public interest' * * * [does] not * * * imply that the public right excludes recognition of parochial private interests" (382 U.S. at 218).

On these premises the Court concluded that the charging party and its private counsel are entitled by the Act to rights and prerogatives of intervention and certiorari application which the Board vigorously opposed as unnecessary and indeed detrimental to *its* status and *its* interests as *dominus litus* (382 U.S. at 217-222). Yet despite its defeat in *Scofield,* the Board continues to insist that the Act is concerned only with protection of the "public interest," and that inasmuch as the charging party's contribution to that interest "is incidental to its efforts to protect its own private interest," its litigation costs and counsel fees are noncompensable.

Of course, the Board's conclusion does not follow from its premise. Even if, contrary to the Board's own concession, the charging party's efforts served *only* to protect and vindicate private interests, its litigation costs and fees would be compensable, because the Act encompasses and seeks to promote and protect private rights and interests, no less than public ones. *Scofield* case, *supra,* 382 U.S. at 218, 220; *NLRB* v. *Strong,* 393 U.S. 357, 360-361. However, the conceded fact is that because the private rights and public inter-

est "interblend," it is *inevitable* that in vindicating its private rights and interests, the charging party will be vindicating the "public interest" as well. Thus, counsel for a successful charging party acts, *pro tanto,* as a "private attorney general" in enforcing a policy Congress deems highly important. Cf. *Trafficante* v. *Metropolitan Life Ins.,* 409 U.S. 205, 211, and cases therein cited. The presence of an administrative agency with enforcing authority is not a bar to recognition of this function of the charging party. *Ibid.*

This case demonstrates that absent the contribution of private counsel for the charging party, the violations alleged often would not be adequately established, to the detriment of public and private interests alike. And the cases are legion in which private counsel representing the charging party have upset Board determinations which frustrated the "public interest" by denying to the charging party statutory rights and remedies [18] it validly claimed. The charging party is often required, as it was here, to resort to the courts to obtain forms of relief which the General Counsel did not seek and which the Board denied but which are

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[18] *Local 833, UAW-AFL-CIO* v. *N.L.R.B.,* 300 F.2d 699 (D.C. Cir.), cert. denied, 382 U.S. 836; *UAW* v. *N.L.R.B.,* 381 F.2d 265 (D.C. Cir.), cert. denied, 389 U.S. 857; *UAW* v. *N.L.R.B.,* 427 F.2d 1330 (6 Cir.); *Textile Workers* v. *N.L.R.B.,* 294 F.2d 738 (D.C. Cir.); *Concrete Materials of Georgia, Inc.* v. *N.L.R.B.,* 440 F.2d 61 (5 Cir.); *Burinskas* v. *N.L.R.B.,* 357 F.2d 822 (D.C. Cir.); *N.L.R.B.* v. *Borg Warner,* 236 F.2d 898 (6 Cir.), unfair labor practice issue modified in other respects, 356 U.S. 342; *Frito* v. *N.L.R.B.,* 330 F.2d 458 (9 Cir.); *N.L.R.B.* v. *Harrah's Club,* 362 F.2d 425 (9 Cir.), cert. denied, 386 U.S. 915; *American Newspaper Pub. Assn.* v. *N.L.R.B.,* 193 F.2d 782 (7 Cir.), cert. denied on other grounds, 344 U.S. 816, aff'd 345 U.S. 100; *International Woodworkers of America, Local 3-10* v. *N.L.R.B.,* 380 F.2d 628 (D.C. Cir.).

literally indispensable to make effectuation of the "public interest" a reality. Proceeding "in accordance with equitable principles," the court below has predicated award of counsel fees on just such contributions "to the public interest in observance by administrative and executive officials of statutory limitations on their authority." *Freeman* v. *Ryan*, 408 F.2d 1204, 1206 (D.C. Cir.).

In short, the issue is not whether the charging party's participation is "incidental to its efforts to protect its own private interest," for a selfish motive on the part of the charging party is an utter irrelevancy. *Young* v. *Higbee Co.*, 324 U.S. 204, 214. The only relevant question is whether it will "effectuate the policies of the Act" to compensate the charging party's successful litigation efforts and deprive the wrongdoer of at least that portion of the fruits of its "willful and persistent" violations which constitutes the charging party's expenditures for costs and private counsel fees to prove and adequately to remedy those violations. See *Tiidee Products, supra,* 426 F.2d at 1251.

The Board's assumption that because Congress relied "primarily" upon an administrative agency and its lawyers to effectuate the public interest, it left no room for awards of counsel fees and costs to private parties aggrieved by the violation is utterly exploded not only by the Board's subsequent decision in *Tiidee,* but, as well, by this Court's decisions in *J. I. Case Co.* v. *Borak,* 377 U.S. 426, and *Mills* v. *Electric Auto-Lite,* 396 U.S. 375. In *Borak,* the court *implied a private right of action* under Section 14(a), where none was expressly given by Congress, because "[p]rivate enforcement of the proxy rules provides a necessary supplement to [Securities and Exchange] Commission

action." 377 U.S. at 432. In *Mills,* the court held that successful private litigants in such actions should be awarded litigation expenses and reasonable attorney's fees for the very same reason that warranted implying a private right of action; namely, to encourage private suits, which, in turn, aid in "vindicating the statutory policy." 396 U.S. at 391, 396, twice citing with approval *Bakery Workers Union* v. *Ratner,* 335 F.2d 691, 696-697 (D.C. Cir.).

In contrast to Section 14(a) of the Securities Exchange Act, the NLRA explicitly provides a role for private parties in unfair labor practice cases. Indeed, without a charge filed by a private person, the Board is powerless even to initiate a proceeding under Section 10. *N.L.R.B.* v. *Fant Milling Co.,* 360 U.S. 301; *Nash* v. *Florida Industrial Commission,* 389 U.S. 235, 238. Serving the charge, producing adequate supporting evidence and persuading the Regional Director, or, on appeal, the General Counsel, to issue a complaint (or one of adequate breadth), is the burden of the charging party exclusively. NLRB Rules and Regulations, Series 8, as amended, Sections 102.14, 102.15, 102.19; *ibid.,* Statements of Procedure, Sections 101.2, 101.4. The role of the charging party and its private counsel after a complaint issues is detailed in *Scofield,* 382 U.S. at 219.[19]

The necessity in every case of filing and adequately supporting a charge, and the provision of a statutory

[19] For other aspects of the charging party's rights which likewise can be vindicated effectively only by competent private counsel, see *Spector Freight Systems,* 141 NLRB 1110; *Walsh-Lumpkin,* 129 NLRB 294; *Textile Workers Union* v. *N.L.R.B.,* 294 F.2d 738 (D.C. Cir.); *Leeds & Northrup* v. *N.L.R.B.,* 357 F.2d 527 (3 Cir.); *Concrete Materials of Georgia, Inc.* v. *N.L.R.B.,* 440 F.2d 61 (5 Cir.).

right to review adverse rulings of the Board provides a far stronger basis here than in *Borak* and *Mills* for concluding that Congress sought to encourage successful participation by the charging party through private counsel by awarding litigation costs and counsel fees.

The Board's citation of and reliance upon *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (Pet. App. 39A), simply reflects a misconception of the holding and rationale of that case. As this Court explained in *Mills* v. *Electric Auto-Lite*, 396 U.S. 375, 391, because Congress in the remedial provision of the Lanham Act:

> "had 'meticulously detailed the remedies available to a plaintiff who proves that his valid trademark has been infringed,' the Court in *Fleischmann* concluded that the express remedial provisions were intended 'to mark the boundaries of the power to award monetary relief in cases arising under the Act.' "

By contrast, here, as in *Mills*, one cannot fairly infer from the "broad command" of Section 10(c) of the NLRB a purpose to circumscribe the Board's power to grant appropriate remedies.

In *Gartner* v. *Soloner*, 384 F.2d 348, 354, n. 12 (3 Cir.), cert. denied, 390 U.S. 1040, the court analyzed *Fleischmann* as follows:

> "its reasoning seemed to turn on the fact that the Sprague rule [that attorneys' fees are recoverable] was not ' * * * developed in the context of statutory causes of action for which the legislature had prescribed intricate remedies.' As mentioned above Section 102 is not the type of statutory cause of action that prescribes 'intricate remedies.' "

The court in *Gartner* noted that since Congress had manifested a reluctance to detail remedies, if it had decided to prohibit any specific relief, it would have so stated. "Absent this, 'appropriate relief' fairly construed must be held to include proper counsel fees" (384 F.2d at 355). Since Section 10 of the National Labor Relations Act is a broad grant of general remedial authority, not a detailed recital of specific remedies, on the Third Circuit's reasoning *Fleischmann* obviously has no application.

As a matter of logic and of precedent, the role played by the General Counsel and the Board cannot be determinative of the compensability *vel non* of the charging party and its counsel. It may well be that the charging party should receive only a nominal award unless the efforts of its counsel demonstrably contributed in some measure to the result.[20] Cf. *Bakery Workers* v. *Ratner, supra.* Nothing is more common than evaluating attorney fee awards on the basis of the value of an attorney's contribution to the result in the case, and, where more than one attorney or set of attorneys is involved, apportioning awards commensurate with their respective contributions. *Angoff* v. *Goldfine,* 270 F.2d 185 (1 Cir.); *Garrett* v. *McRee,* 201 F.2d 250 (10 Cir.); *Powell* v. *Pennsylvania R. Co.,* 267 F.2d 241 (3 Cir.).

Inasmuch as the record herein clearly demonstrates that the participation of Union counsel has been vital to proof of the case and to award of effective remedial relief, the order of the court below properly should have included reimbursement to the charging party for

[20] This is not to say, of course, that charging party's counsel must introduce new theories which were not in the general counsel's complaint, or present the decisive witness or analysis. It is to say that he must *demonstrate* that his services produced a *benefit.*

attorneys' fees and expenses. Even though the court of appeals rested its award only on the logical compulsion of *Tiidee*,[21] the preceding discussion demonstrates that, even in the absence of the interim *Tiidee* decision, the court would have had no choice but to hold that, in denying this remedy, the Board had abused its discretion.

**B. The Board's Refusal To Award Reimbursement of Organizational Expenses Was an Abuse of Discretion**

It is equally clear that the Board's original refusal to award excess organizational expenses—*i.e.*, the added costs of organizing and reorganizing employees occasioned by unlawful and intimidating employer resistance to unionization—was arbitrary and capricious, and, even without *Tiidee* to juxtapose against this refusal, the court below would have been required to modify the Board's order as to these expenses.

Reimbursement of such extraordinary expenses, directly caused by employer wrongdoing, is a patently appropriate remedy. So patently appropriate, in fact, that the Board could think of no way of rationalizing the denial of this remedy except by indiscriminately lumping the issue as to these expenses together with its treatment of litigation expenses, and invoking considerations of "the role of a charging party in the statutory scheme in the light of the basic principles that Board orders must be remedial not punitive, and collateral losses are not considered" (Pet. App. 38A-39A).

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[21] The court, however, perceived "obvious difficulties with [the Board's] approach, certainly in the case of an employer who appears to look upon litigation as a convenient means of delaying—and thereby perhaps avoiding—the fatal day of union recognition and collective bargaining" (Pet. App. 9A).

But the Board's asserted concerns about the prohibitions against award of punitive damages and reimbursement of collateral losses were clearly peripheral and unsound, as *Tiidee* subsequently acknowledged, leaving as the only viable remaining factor cited by the Board the weight to be assigned to the "charging party's participation in litigation" (Pet. App. 39A). The question of the importance of a charging party's participation in *litigation,* however, is totally irrelevant to the question whether a union should be reimbursed for *organizing expenses* needlessly caused by Heck's wrongful misconduct, both in unlawfully refusing to bargain and in engaging in "extensive violations of the Act which directly involved nearly every employee in the unit" (Op. App. 3a).

The Board's denial of reimbursement of excess organizing expenses, accordingly, is completely devoid of rational foundation. Since such expenses are plainly a direct consequence of Heck's unlawful conduct, and reimbursement thereof is a patently appropriate remedy, the Board's refusal of the requested enlargement of its order was a gross abuse of discretion.

## CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973.

**No. 73-370**

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

*vs.*

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO;

HECK'S, INC.,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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## BRIEF OF THE EMPLOYER, HECK'S, INC.

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### INTEREST OF THE EMPLOYER.

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The Employer, Heck's Inc., has a direct and financial interest in this proceeding. As a result of National Labor Relations Board proceedings, the Board ordered Heck's to cease committing certain unfair labor practices, but did not require Heck's to reimburse the Union for litigation or organizational expenses. Heck's did not participate in the review proceedings before the court below. Despite Heck's absence, that court enlarged the

remedy ordered by the Board and required Heck's to reimburse the Union for its litigation and organizational expenses. The Employer moved to intervene before the court below, in order to seek rehearing and there defend vital interests placed in jeopardy for the first time as a result of that court's decision. That court initially denied Heck's motion but later reconsidered its denial and granted Heck's leave to intervene. (Order filed January 25, 1974.)

Only the Employer, by advancing arguments not advanced by the Board[1] or by the Union, can adequately defend its private interests which were for the first time adversely affected by the judgment of the court below. That is, Heck's alone can adequately defend itself against the grave financial consequences first imposed upon it by that court's extraordinary reimbursement order. Accordingly, by virtue of its interest in these proceedings, Heck's requests that it be made a party before this Court.

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1. In *U. A. W.* v. *Scofield (Fafnir Bearing Co.)*, 382 U. S. 205 (1965), and *Trbovich* v. *United Mine Workers of America*, 404 U. S. 528 (1972), this Court recognized that an agency with a duty to enforce both public and private rights may injure the latter while pursuing the former and that consequently private parties have a right to intervene in review or administrative proceedings to protect vital private interests. The rationale of *Scofield* and *Trbovich* is applicable to this case.

## OPINIONS BELOW.

The citations to the opinions below are adequately set forth in the brief of the National Labor Relations Board.

## JURISDICTION.

The jurisdictional requirements are adequately set forth in the brief of the National Labor Relations Board.

## RESTATEMENT OF THE QUESTION PRESENTED.

The issue as framed by the Board is:

> "Whether the court of appeals exceeded its authority as a reviewing court by substituting its judgment for that of the Board concerning the appropriate remedy for unfair labor practices." (Issue 2, Questions Presented, Board's brief)

As a part of this issue is a sub-issue concerning the Board's underlying statutory power to remedy unfair labor practices. The sub-issue that is inextricably intertwined with the issue set forth above is:

1. Whether the statute confers upon the Board the power to grant the additional remedies prescribed by the court below.

This sub-issue is in fact the real issue in this case. A resolution of this sub-issue is a prerequisite to a determination of the propriety of the judgment and remedial award of the court below. Thus, before this Court decides the issue of whether or not the court below erred in enlarging the Board's remedial order by shifting counsel and campaign costs to the employer, this Court must first reach the question as to the Board's statutory jurisdiction to award such relief in the first place. A reviewing court may enlarge an administrative agency's order and award additional relief not granted by the agency only if the agency was initially empowered by statute to grant this additional relief. That is, if the Board does not have legislative warrant to compel a violator of the Act to defray his opponent's litigation and organizational campaign expenses, a court cannot reasonably reverse the Board for failing to order this remedy. The threshhold question is, therefore, whether the National Labor Relations Board has statutory jurisdiction to shift such expenses to an employer who has violated the Act.

A second sub-issue has been raised by the decision of the court below. That court inferred that the Board has statutory

power to grant wages and other fringe benefits to employees that might have accrued to them as a result of bargaining even though these benefits had not been agreed to by the employer. The sub-issue raised, then, by the suggestion of the court below is:

2. Whether the National Labor Relations Board's remedial jurisdiction includes the power to grant to employees wages and other benefits that might have accrued to them as a result of bargaining even though these benefits had not been agreed to by the employer.

This sub-issue, just as the resolution of the issue of whether the Board has power to award litigation and campaigning costs, involves a consideration of the extent of the Board's remedial jurisdiction. The inference of the court below directly contravenes this Court's mandate in *Porter*.[2] Therefore, it is appropriate for this Court to consider this sub-issue in order to properly guide courts and parties who will be embroiled in controversies similar to the instant case.[3]

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2. *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99 (1970).

3. It is respectfully requested that this brief be considered as support for the Employer's position in this proceeding and also for his position in *Heck's Inc.* v. *Food Store Employees Union, Local 347, etc.*, A-653, 73-559, petition for rehearing pending.

## STATUTES INVOLVED.

Section 10 of the National Labor Relations Act, 29 U. S. C. Section 160 in part provides:

"(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *."

"(e) The Board shall have power to petition any court of appeals of the United States * * * for the enforcement of such order * * *. Upon the filing of such petition, the court * * * shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * *"

"(f) Any person aggrieved by a final order of the Board * * * denying in whole or in part the relief sought may obtain a review of such order * * * in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * * Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction * * * to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board * * *."

## STATEMENT.

In this case, the National Labor Relations Board determined that the Employer committed various acts which constituted violations of the Act and issued an order designed to rectify the Employer's conduct. The court below[4] enforced the Board's order and then remanded the cause in order that the Board might consider additional remedies. On remand[5] the Board granted some of the remedies requested by the Union but refused to assess upon the employer the Union's litigation and organizational costs, allegedly incurred because of the Employer's unlawful conduct. The court below[6] reversed the Board on this aspect of its order and shifted the Union's attorney and organizational expenses to the Employer. It is against this background that the positions of the participants in this cause should be evaluated.

4. 433 F. 2d 541.
5. 191 NLRB No. 146.
6. 476 F. 2d 546 (C. A. D. C., 1973).

## SUMMARY OF THE ARGUMENT.

The Employer urges that the Board itself has no statutory sanction in the first instance to shift the Union's counsel and organizational expenses to the Employer. That relief has nothing to do with making the employees whole or with securing their right to act collectively. Instead, a prescription of this relief is an exaction of damages from or an infliction of a penalty against the employer which is directly contrary to the remedial design and policy of the Act.

The Board, however, maintains that it has remedial authority to shift these union costs to an employer. Thus, while it declined here to charge the Employer for the Union's counsel and campaign costs, it nonetheless maintains that it has sole authority to determine whether or not to assess these expenses on violators of the Act.

A resolution of the issue joined by these contrary positions —whether the statute confers upon the Board the power to grant the additional remedies prescribed by the court below— is a prerequisite to determining the propriety of the judgment and award of the court below. That is, a reviewing court may enlarge an administrative agency's order and award additional relief not granted by the agency only if that agency was statutorily empowered to grant this additional relief in the first instance. Consequently, since the Board does not have legislative warrant to compel a violator of the Act to defray his opponent's litigation and organizational expenses, the court below erred when it reversed the Board for failing to order this remedy and when it assessed these expenses upon the Employer.

In addition to shifting the Union's organizational and counsel costs to the Employer, the decision of the court below may be read to suggest that the Board has remedial jurisdiction to make employees whole by granting wages and other benefits

which might have accrued to them from the bargaining process. 476 F. 2d at 553.

In Section 4 of its opinion entitled "Compensation for Lost Benefits", the court below considered the Union's request for a remedy "making its members whole for wage and other fringe benefits which might have accrued from the bargaining process . . . " The Board in arguments before the court below indicated that "it was wholly lacking in statutory authority to give relief of this nature[, and] that, even if it had power to act, this would not be an appropriate case in which to do so." In considering the Union's request, the court below did not specifically agree that the Board lacked statutory power to award the requested relief. Consequently, the Employer submits that the failure to judicially confirm the Board's own delimitation of its remedial jurisdiction supports an inference that the court below believes that the Board possess power to award benefits which might have accrued as a result of bargaining. The import of such an inference is directly contrary to the teachings of *Porter, supra,* since an award of these benefits is equivalent to an imposition of substantive contract terms.

Rather than attempting to invade areas from which it has been Congressionally barred, and assess damages or inflict penalties upon violators of the Act, the Board should undertake to employ the remedies that do not contravene the scheme of the Act and that will fully protect employee rights. In this regard, the Board should make greater use of Section 10(j) which permits it to petition for injunctive relief in order to insulate employees from pervasive unfair labor practices.

## ARGUMENT.

The Employer, as earlier stated, contends that the Board lacks statutory power to shift a union's counsel and campaign costs to an employer who has violated the Act. Consequently, the court below erred when it imposed this relief on the Employer here. This position will be fully argued in part II of this brief. In addition, if this Court disagrees and believes that the Board has power to award the challenged relief, the court below nonetheless improperly enlarged the Board's order. The facts of this case demonstrate that the Board did not abuse its discretion in selecting its relief and in fashioning its remedial order.

### I.

### THE COURT BELOW EXCEEDED ITS AUTHORITY BY ENLARGING THE BOARD'S CHOSEN REMEDIES.

The Board is charged with selecting the remedies which will effectuate the policies of the Act.[7] This Court has recognized that since there is an interrelationship between the policies of the Act and the remedies selected by the Board, the Board's selection of remedies should be given great deference by reviewing courts and not lightly reversed.[8] It follows that, if the Board possesses discretion to award the challenged remedies, it did not abuse this discretion by refusing to order such relief here.

7. 29 U. S. C. 160.

8. *Phelps Dodge Corp.*, 313 U. S. 177, 194 (1941); *Virginia Electric and Power Co.* v. *N. L. R. B.*, 319 U. S. 533, 539-540 (1943). As this Court has observed, agency orders may be modified by reviewing courts only "where the remedy selected has no reasonable relation to the unlawful practices found to exist". *Jacob Siegal Co.* v. *Federal Trade Commission*, 327 U. S. 608, 613 (1946). The jurisdiction of the reviewing court is limited to deciding "only whether under the pertinent statute and relevant facts the [agency] made 'an allowable judgment in [its] choice of remedies.'" *Butz* v. *Glover Livestock Commission Co.*, 411 U. S. 182, 189 (1973).

since the employer did not engage in vexacious or wanton conduct or litigate for oppresive reasons so as to justify the imposition of a penalty upon him.[9] Rather, in the underlying administrative proceeding, he introduced substantial and pertinent defenses to the charges against him. As the Board itself concluded, the employer's defenses were not "clearly meritless on the face, [and] . . . if fully credited and given [the] broadest possible sweep, would have resulted in the rejection of sufficient [union authorization] cards to have vitiated the Union's majority claim." The substantiality of the employer's defense, that it doubted in good faith the union's majority claim, is manifested by its success in the hearing before the Administrative Law Judge. That Judge not only exonerated the employer from refusing to bargain but further stated that the employer's "reluctance to recognize the union pursuant to the latter's claim of majority based on authorization cards is certainly understandable, to say the least . . ." in view of the employer's previously successful attacks on the union's majority claim.[10]

Consequently, even if the Board may in its discretion punish violators of the Act, the court below did not demonstrate that the Board's failure to inflict punishment here and to grant organizational or counsel expenses was a patent abuse of its discretion or was calculated to achieve ends other than those which can be said to effectuate the purposes of the Act. Therefore, by substituting its judgment for that of the Board, the court below exceeded its power and acted inconsistently with the orderly process of judicial review. *N. L. R. B.* v. *Metropolitan Life Insurance Co.*, 380 U. S. 438 (1965).[11]

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9. In *Hall* v. *Cole*, *supra*, this Court observed that the element essential to justify the imposition of punishment is the existence of vexacious or wanton conduct on the part of the unsuccessful litigant.

10. In addition, the employer supported its defenses to Section 8(a)(1) allegations with sufficient evidence to sustain some and have others rejected on the basis of credibility resolutions.

11. Furthermore, the court below, if dissatisfied with the order of the Board, should have remanded the cause to the Board rather

## II.

## THE BOARD'S REMEDIAL JURISDICTION DOES NOT PERMIT IT TO ASSESS DAMAGES OR INFLICT PENALTIES UPON VIOLATORS OF THE ACT.

### A. The Board Does Not Have Statutory Warrant to Require a Violator of the Act to Defray His Adversary's Litigation and Organizational Campaign Expenses.

The Employer contends that litigation and organizational expenses properly are considered "damages" as this Court and the Board have employed that term when discussing the extent of the Board's remedial authority.[12] Accordingly, the Board has neither statutory nor judicial sanction to require an employer who has violated the Act to reimburse the Union for these costs. Moreover, the Employer further submits that even if these expenses are not viewed as damages by this Court, the Board nevertheless lacks jurisdiction to award these costs to the Union; the rationale requiring an unsuccessful party to bear these expenses is punitive and the Board cannot take punitive action against violator of the Act. In as much as the Board lacks statutory jurisdiction to assess campaign and counsel costs on the employer, the court below could not reverse the Board for failing to impose these costs. A court may modify an agency order and award relief not granted by that agency only if the agency has statutory jurisdiction to award this relief initially. Since the Board here is prohibited from awarding counsel and organizational costs, the court below could not enlarge the Board's order and award these costs.

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than usurping the Board's exclusive authority to fashion remedies. In the words of this Court "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration." *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 20 (1952).

12. *Vaughan* v. *Atkinson*, 369 U. S. 527.

**1. An Analysis of Judicial and Administrative Determinations and Legislative History Demonstrates That the Board Lacks Authority to Assess Damages Upon Violators of the Act.**

(a) *The Court and Board Decisions.*

The desideratum of the labor policy underlying the Act is to secure employees in their right to act collectively for their mutual benefit. In order to implement this policy, Congress has empowered the Board to devise remedies which have a nexus with the purposes of the Act. As this Court has recognized:

> "[A]n employer [who has violated the Act] may be required not only to end his unfair labor practices; he may also be directed affirmatively to recognize an organization which is found to be the duly chosen bargaining-representative of his employees; he may be ordered to cease particular methods of interference, intimidation or coercion, to stop recognizing and to disestablish a particular labor organization which he dominates or supports, to restore and make whole employees who have been discharged in violation of the Act, to give appropriate notice of his compliance with the Board's order, and otherwise to take such action as will assure to his employees the rights which the statute undertakes to safeguard."[13]

Each of these measures is remedial and therefore within the Board's statutory powers.[14] However, as this Court also has recognized:

> "The Labor Management Relations Act sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with backpay." *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656, 665 (1954).

This limitation on the Board's remedial power was highlighted in the *Republic Steel* case. There, this Court refused to enforce

13. *Republic Steel Corp.* v. *N. L. R. B.*, 311 U. S. 7, 12 (1940).
14. *Republic Steel Corp.* v. *N. L. R. B.*, *supra.*

a Board order requiring an employer to pay sums of money to third parties after having awarded compensatory backpay to his employees. In that case, the Board had directed the employer to deduct from back wages due to unlawfully discharged employees, the amounts they had received from governmental agencies that had employed them on relief projects, and to then pay the money deducted to the Government. In reaching its decision that reimbursement to third parties was not sanctioned by the Act, this Court held that such payments amounted to "an exaction neither to make the employees whole nor to assure that they can bargain collectively with their employer through representatives of their own choice." at 12-13. The challenged relief in the instant case, just as the relief in question in *Republic*, has nothing to do with making employees whole for their losses and instead is an exaction of damages that has no relation to the remedial scheme and policy of the Act. Accordingly, just as the Board may not require a violator of the Act to make up the losses that have been sustained by governmental agencies, so also the Board has no statutory power to order a violator to reimburse a union for its campaign and attorney costs.

The Board itself, prior to the instant case, has recognized that it has no general compensatory powers and may grant monetary awards only in so far as these awards make employees whole for their actual losses. In *National Maritime Union*,[15] the Board rejected the employer's invitation that it assess damages upon a union which struck to compel the employer to discriminate against his employees. The Board held that even if such an award would encourage employers to resist discriminatory union demands, it was barred by Congress from assessing damages upon a violator of the Act. In reaffirming its authority to award backpay and to refund illegally exacted dues to employees, the Board stated that these awards were designed to recompense employees for their actual losses and

15. 78 NLRB 971 (1948).

therefore were consistent with the remedial scheme of the Act and within the power of the Board to grant.[16]

Accordingly, consistent with the expressed views of this Court and of the Board itself, the Employer urges that this Court hold that the Board has no statutory power to shift any part of the union's organization and counsel costs to an employer even though that employer violated the Act, and that therefore the court below could not award this relief to the union.

Considerable legislative history further supports the Employer's position.

(b) *Legislative History.*

The question of whether the Board has jurisdiction to require an employer to defray the litigation and organizational expenses of a union must be considered in light of the enframing circumstances of relevant legislative history. This history evinces that Congress deliberately excluded damage awards from Board's arsenal of remedies.[17]

The initial version of the National Labor Relations Act introduced by Senator Wagner in 1934 granted power to the Board to order persons who violated the Act

> "to cease and desist from such unfair labor practice, or to take affirmative action, or to pay damages, or to reinstate employees, or to perform any other acts that will achieve substantial justice under the circumstances."[18]

Thereupon, the Committee on Education and Labor held hearings and struck out only the words "or to pay damages, or

16. The Board also held in *Operating Engineers, Local 513*, 145 NLRB 554 (1963), that employees were not allowed to recover backpay for time lost from work due to being physically assaulted by union agents. Similarly, in *St. Claire* v. *Teamsters 515*, 442 F. 2d 128 (CA 6, 1969), the Board was found not to have the power to remedy collateral injuries, such as loss of a home due to inability to pay a mortgage.

17. McGuiness, *Is the Award of Damages for Refusals to Bargain Consistent with the National Labor Policy?* 14 Wayne L. Rev. 1086 (1968). (Hereinafter, referred to as McGuiness.)

18. Cong. Rec. 3445 (1934).

to reinstate employees."[19] from the remedial provisions of Senator Wagner's bill.

In 1935, Senator Wagner introduced a second bill, with a provision permitting the Board to issue

> "an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, *including restitution*, as will effectuate the policies of the Act."[20]

Thereafter, in a critical memorandum, the Senate Committee stated:

> "The broad term 'restitution' is used in S. 1958 to take in the host of varied forms of reparation which the National Labor Relations Board has been making in its present decisions, to suit the needs of every individual case. An effort to substitute express language such as reinstatement, back pay, etc., necessarily results in narrowing the definition of restitution, which may include many other forms of action."[21]

The Committee then amended the remedy provision of the bill to read as it now does, empowering the Board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act."[22]

The House approved the language of the remedial provisions of the Senate Bill, which then became law.[23]

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19. S. Rep. No. 1184, 73d Cong., 2d Sess. (1934) at 3. This bill died as Congress authorized the establishment of a Board to administer the National Industrial Recovery Act until June, 1935. (HRJ Res. 375, 73d Cong., 2d Sess. (1934).)

20. S. 1958 74th Cong. 1st Sess. (1935).

21. Senate Comm. on Education and Labor, 74th Cong., 1st Sess., Memorandum comparing S. 1958 as a substitute for S. 2926, 34 (Comm. Print 1935).

22. S. Rep. No. 573, 74th Cong., 1st Sess. 15 (1935). The Senate Report did not further explain the reason for amending the Wagner Bill. McGuiness, *supra*, n. 38, at 1092.

23. The initial House bill adopted the damage provision of the Senate bill; (H. R. 8423, 73d Cong., 2nd Sess., Section 205(c) 1934); later versions adopted the restitution provision contained in S. 1958. (H. R. 6187, 74th Cong., 1st Sess., Sec. 10(d) (1935);

In addition to the foregoing, there are further manifestations of Congressional resolve[24] not to permit the Board to bestow damages or the less severe remedy of restitution on successful litigants before that agency. Senator Taft who sponsored Section 303[25] which provides for a damage remedy in Federal District Court commented that this additional and not previously available relief was needed in as much as parties could not bring a suit for damages in the Board. He explained that the authority to award damages was accorded to courts rather than to the Board because

> "it is not felt, I think, by any of those on the other side of these questions that the Labor Board is an effective tribunal for the purpose of trying to assess damages in such a case. I do not think anyone felt that that particular function should be in the Board."[26]

It is thus indisputable that the Board's remedial jurisdiction does not embrace the power to grant damages to successful contestants in suits before that agency; accordingly the Board has no jurisdiction to require an employer who has committed an unfair labor practice to bear the union's counsel or campaign expenses, and a reviewing court may not enlarge the Board's remedial order and order this reimbursement.

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H. R. 6288, 74th Cong., 1st Sess., Sec. 10(d)) Still later, the House adopted the final Senate version. H. R. 7978, 74th Cong., 1st Sess., Sec. 10(c) (1935). H. R. Res. 263, 74th Cong., 1st Sess., 79 Cong. Rec. 9731 (1935). See McGuiness, *supra* n. 40, at 1093.

24. The Senate and House aimed a substantial amount of criticism at the word "restitution" as it appeared in early versions of the bills. See, *e.g.*, Hearings on S. 1958 Before the Senate Comm. on Education and Labor, 74th Cong., 1st Sess., pt. 2, at 244, 448, 672, 750, 846-48, 850-51 (1935); Hearings on H. R. 6288 Before the House Comm. on Labor 74th Cong., 1st Sess., 284-85 (1935). McGuiness, *supra*, n. 42, at 1093.

25. 29 U. S. C. Sec. 187.

26. 93 Cong. Rec. 4858 (1947).

**2. The Board Is Statutorily Prohibited from Inflicting Penalties Upon a Violator of the Act.**

Whether or not an award of counsel and organizational costs is considered to be "damages", the Board's asserted power to shift these costs can be justified only if it is authorized to inflict penalties, since payments to the union are wholly unrelated to making employees whole and only punish the employer.[27] The Board may impose penalties upon violators of the Act only if it is specifically authorized to do so by the Act.[28] However, an analysis of the Act discloses that the Board is not authorized to shift campaign or attorney expenses from the successful to the unsuccessful litigant. In as much as the authority to award attorney's fees has been conferred upon other agencies by statute,[29] it is apparent that Congress deliberately chose not to permit the Board to assess these costs upon a violator of the Act.

Furthermore, this Court has expressly interdicted the Board from assessing penalties upon persons who have committed

27. *Hall* v. *Cole*, 412 U. S. 1 (1973). The rationale underpinning the assessment of the union's litigation expenses upon an employer can be only the determination to punish him for his alleged vexacious or wanton conduct. The identical reason must be advanced to support the imposition of the union's campaign expenses upon an employer, since neither counsel nor organizational costs are proximately related to securing the statutory rights of employees to be compensated for their actual losses or to engage in collective action.

28. Although, as this Court has observed, Federal courts may exercise their equitable power, in the absence of express statutory authorization, and award litigation costs when the interests of justice so require, this inherent authority does not extend to administrative agencies such as the Board. Rather, the Board is a statutory creation and may employ only those powers specifically accorded to it by Congress. See, 1 Am. Jur. 2d, Administrative Law, Section 72; *H. K. Porter* v. *N. L. R. B.*, 397 U. S. 99 (1970).

29. See, *e.g.*, Clayton Act, Sec. 4, 38 Stat. 731, 14 U. S. C. Sec. 15; Communications Act of 1934, Sec. 206. 48 Stat. 1072, 47 U. S. C. Sec. 206; Interstate Commerce Act, Sec. 16, 34 Stat. 590, 49 U. S. C. Sec. 16(2); Securities Exchange Act of 1934, Secs. 9(e), 18(a), 48 Stat. 890, 897, 15 U. S. C. Secs. 78i(e), 78r(a).

unfair labor practices, even if the infliction of such punitive relief would foster the policies of the Act. In the words of this Court:

> "We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties of fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative action is remedial, not punitive." *Republic Steel Corp.* v. *N. L. R. B., supra* at 11-12.[30]

From the foregoing it is apparent that the Board has no statutory or judicial warrant to fix a penalty on the employer here, whether that penalty is designed to rectify the employer's past unfair labor practices or to discourage illegal conduct in the future.[31]

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30. To the same effect is *Carpenters Local 60* v. *N. L. R. B.*, 365 U. S. 651 (1961).

31. The Board's assertion of power to award litigation expenses also abuts against the established judicial principle that "attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefore." *Fleischmann Corp.* v. *Maier Brewing Co.*, 386 U. S. 714, 717 (1967). The importance of defining the limits of the Board's power in this remedial area cannot be overstated. The jurisdiction of the Board to award litigation and organization costs is an issue which will frequently arise. Indeed, in *Tiidee Products, Inc.* v. *N. L. R. B. and International Union of Electrical, Radio and Machine Workers, AFL-CIO*, petition for writ of certiorari before judgment pending, the Board implemented its asserted power and shifted the union's attorney's fees to the employer. Prior to *Tiidee* an assessment of counsel costs in Board administrative proceedings was restricted to contempt proceedings brought against persons who deliberately violated court decrees enforcing Board orders; even in these situations, reimbursement of Board attorney fees was often not required. See, *e.g.*, *N. L. R. B.* v. *Stafford Trucking Inc.* (not officially published), 77 LRRM 2468 (CA 7, 1971); *N. L. R. B.* v. *Ralph Printing and Lithographing Co.*, 433 F. 2d 1068 (CA 8, 1970). In determining whether to grant extraordinary penalties the Board now appears to be distinguishing between frivolous (*Tiidee Products, Inc.*, 194 NLRB 1234 at 1236)

**B. The Board Does Not Have Statutory Jurisdiction to Award Wages and Other Benefits That Might Have Accrued as a Result of Bargaining in the Absence of Agreement by the Employer to the Institution of These Conditions of Employment.**

It is implicit in the opinion of the court below that the Board has statutory power to bestow upon employees, as a remedy to cure unfair labor practices, wages and fringe benefits that might have accrued to these employees as a result of bargaining, even though these benefits had not been agreed to by the employer. In the Employer's view, such relief is barred by this Court's decision in *H. K. Porter*, 379 U. S. 99 (1970). In *Porter*, this Court held that the Board could not require an employer to accept a union dues check-off provision in his labor contract, even though the employer had willfully and steadfastly refused to negotiate in good faith about this clause.

There is no distinction between the relief barred by *Porter* and the remedy that the court below suggests that the Board has power to impose. In either case, the employer has not agreed to the wages and other employment conditions which are imposed upon him and for which he is as fully responsible as if he had agreed to them. Then, too, though the award may be dubbed "compensation for lost benefits" (as it is in the court below), the payment to employees is equal exactly to the benefits that would be produced by the retroactive imposition of contract terms. Since the major premise of *Porter* is that the Board may not dictate the substantive terms of employment that will govern the bargaining relationship of the parties, it is logically immaterial

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and debatable defenses (the instant proceeding). Such a distinction is itself untenable. No litigant should be balked from vigorously pursuing a position in which he honestly believes, however devoid of merit it may be, by the threat that his opponents' various costs will be assessed upon him if he loses. Consequently, the employer urges that this Court specifically delimit the Board's remedial powers to the confines established by Congress and prohibit it from exacting union counsel and campaign expenses from an employer.

whether these terms are to be applied retroactively or prospectively. Furthermore, whether contract terms are to be prospectively or retrospectively applied the Board cannot accurately gauge the benefits the employees would have achieved as a result of free negotiations.[32] Consequently, artificially implanted employment conditions whether applied retroactively or prospectively may exacerbate the already deteriorated relations between the parties and may well dislocate the very bargaining relationship that the Act was intended to foster. Moreover, retroactively imposed contract terms under the guise of "compensation" will inevitably serve as a floor from which bargaining for subsequent contracts will begin, thereby reinforcing the initial governmental infringement on the collective bargaining process. Accordingly, this Court should reverse the decision of the court below insofar as it implies that the Board has power to remedy unfair labor practices by awarding wages and other benefits that the union had sought but had been unable to secure from the employer because the latter refused to agree to the inclusion of these conditions in a contract.

### C. The Board's Arsenal of Remedies Includes Injunctive Relief Which Amply Protects Employee Rights.

While the assessment of a union's counsel and campaign costs upon an employer is beyond the Board's statutory remedial powers, the Board has weapons which do not contravene the remedial design of the Act and which fully protect the rights of employees. For example, Section 10(j) of the Act permits the Board to petition for injunctive relief in order to insulate employees from pervasive unfair labor practices. The legislative history of Section 10(j) demonstrates that this provision was intended to prevent persons from

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32. As this Court observed in *Porter*:

> "It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strength of the parties." at 107-108.

> "violating the Act to accomplish their unlawful objectives before being placed under any legal restrictions and thereby to make it impossible or not feasible to restore or preserve the status quo pending litigation."[33]

Thus, injunctive relief under 10(j) coming virtually at the time of the asserted violation will protect employee rights during the ensuing and sometimes protracted administrative process. Greater reliance on Section 10(j) injunctive relief has produced several salutory results particularly in the cases involving organizational campaigns.[34]

On the other hand, the challenged monetary remedies assessed upon this employer by the court below do not provide compensation or any other relief for the affected employees. Rather, these remedies serve only to penalize this employer for urging plausible defenses to the charges against him. Moreover, it has been said that the Board's principle remedial problem is delay;[35] it cannot be doubted that a Board remedy, to be effective, must be awarded with dispatch in order that the cause be promptly disposed of. If the Board is empowered to shift counsel or campaign costs this will considerably prolong the administrative proceeding since collateral hearings and discovery procedures will be necessary to determine the proportion of the union expenses that the employer must bear.

The beneficial effects on employee rights from the utilization of Section 10(j) are patent; the fact that the Board has sparingly employed[36] this provision provides no justification for it to usurp

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33. S. Rep. No. 105 80th Cong. 1st Sesss. 27 (1947).

34. Employees who may have been illegally discharged can be promptly returned to their employment. This immediate reinstatement is often the key to preserving employee rights during organizational campaigns because it greatly reduces the apprehension caused by the discharges among the remaining employees.

35. Advisory Panel on Labor-Management Relations Law, Organization and Procedure of the National Labor Relations Board, S. Doc. 80, 86th Cong. 2d Sess. 2 (1960).

36. According to the 1971 Annual Report of the Board, that agency initiated sixteen 10(j) proceedings during fiscal year 1971.

power deprived by Congress and to fix penalties or damages on employers well after the time that their conduct that was found to violate the Act has occurred. The Board should be preoccupied with exploring the effective means to secure employee rights which are at hand, rather than invading areas restricted from it by Congress and asserting powers which it does not possess.[37]

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Of this sixteen, eight were successful in procurring an injunction, three were settled, only three were denied or dismissed, and two were pending at the conclusion of the fiscal year. During fiscal year 1972, the Board proceeded on twenty-one 10(j) injunctive proceedings. It procured an injunction in eleven of these proceedings, three were settled, one was withdrawn, and only three were denied or dismissed. Three were pending at the conclusion of the fiscal year. National Labor Relations Board Annual Report 1972. It would appear that the Board's batting average in 10(j) proceedings would encourage it to utilize this remedy more frequently.

37. It appears that Congress believes that the Board's remedial jurisdiction is sufficient to effectuate the Act's policies. While Congress has encouraged the use of Section 10(j) by the Board (Role of Federal Government in Labor Relations 49 LRRM 74, 81-83 (1962)) the Board has not been authorized to inflict punishment or assess damages upon even recalcitrent parties. See, e.g., *Administration of the Labor-Management Relations Act by the NLRB*, Subcommittee on NLRB (Pucinski, Chairman) of the House Committee on Education and Labor, 87th Cong., 1st Sess. (Comm. Print, 1961). The question of expanding the Board's remedial jurisdiction has been often considered. See, e.g., *Hearings on H. R. 11725 Before the Special Subcomm. on NLRB of the House Comm. on Edc. and Labor*, 87th Cong, 1st Sess. (1961). Numerous Legislative proposals including those suggesting procedural reforms and that the Board be allowed to impose punitive damages have been advanced. See 107 Cong. Rec. 13,078 (1961), and H. R. 11,725, 90th Cong., 1st Sess. Section 3 (1968). Congress has had repeated opportunities to allow the Board to assess damages or impose penalties upon unsuccessful litigants. It is apparent that Congress has consiously chosen not to extend the Board's remedial powers in those directions.

## CONCLUSION.

The Employer urges that this Court adopt the views of the Employer and accordingly reverse the Judgment of the Court below.

Respectfully submitted,

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